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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 225

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

v.

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF WILLIAM A. DRIGGERS, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this Court to review on *writ of certiorari* a judgment of the Supreme Court of the State of South Carolina *in the case of Marcella Driggers, as Administratrix of the estate of Willian A. Driggers, deceased, versus Atlantic Coast Line Railroad Company*, defendant and appellant below, ren-

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dered on the 28th day of March, 1928 (R., 113). Under the practice prevailing on appeal in South Carolina, no judgment separate from the opinion of the supreme court is rendered, and the opinion of the supreme court is the final judgment. (See Clerk's Certificate, R., 139.)

The matters involved and the reasons relied on by petitioner for the allowance of the writ are:

I.

This action, which was tried and decided under the Federal Employers' Liability Act (R., 1, 90), was brought to recover for alleged negligent death of plaintiff's intestate, William A. Driggers, employed at Charleston, South Carolina, as a brakeman in a switching crew, *who was killed by stepping from the front running board of his own engine, on a clear, sunshiny day, directly into the pilot beam of an approaching engine on the adjacent main line, at a place where he had a clear view of the approaching engine for two thousand feet or more for a distance of one hundred feet or more, measuring perpendicularly, before reaching such main line.* Intestate was a member of a switch crew, with petitioner's engine No. 164, engaged in switching cars to various points. At the time of the accident the crew was making a delivery of cars to the Seaboard Air Line Railway from the track referred to in the testimony as the Etiwan Lead track (R., 25, 28, 30). The *locus in quo* of the accident is made clear by reference to the "sketch" or plan of the tracks in the record (R., 50). The track from which intestate's

engine was entering the northbound main line is that shown on the sketch or plan between Ashepoo Lane and Planters' Lane, as "track to coal yard"—east of one designated "track to Fertilizer Mill," running in a northerly direction from A. C. L. northbound track across Meeting Street road to the coal yard. This spur track is generally designated in the testimony as the "Etiwan Lead." The track to the left of the northbound track, designated on the plat as "A. C. L. Rwy. southbound track," is the main line track on which the passenger train No. 79, which struck intestate, was running in a southerly direction. The two tracks west of that track are Southern Railway tracks and have no connection with the accident. The northbound and southbound main line tracks are twelve feet apart, measured from center to center (R., 27); railroad tracks are standard and laid out with regularity, being usually a standard distance between double tracks (R., 27). The scene is also graphically shown by the second photograph in the record (R., 50), bearing the legend "Men are about 270 feet on the curve from switch, camera about 1,000 feet from switch, camera pointed south." The "men" designated in this picture are on this Etiwan Lead, about 270 feet from the "switch" indicated, which leads to the northbound main line, at which switch the accident occurred, and the track in the middle of the picture, to the right of the northbound main line, is the southbound main line on which the passenger train with which intestate collided in stepping off the switch engine was running. The two tracks to the right of this

picture are Southern Railway tracks. Intestate's switch engine and crew had come out of Charleston yard with the engine to make this movement and, as they approached Etiwan Lead, the conductor, McDonald (also called yard foreman), directed intestate to cut a car in that track, and the conductor threw the switch into the Etiwan Lead, and the switch engine and cars went into that track from the northbound main line (R., 28, 29). After delivering the car and picking up some cars in this spur, the switch engine moved back *toward* the main line across Meeting Street Road, which crossing intestate flagged for the engine (R., 30), and then got on right-hand side of the front footboard of the engine, as it approached the northbound main line (R., 30, 28), at a speed of about six miles an hour, moving on an upgrade (R., 36). When the switch engine reached the northbound main line, intestate stepped or swung off between the north and southbound main tracks and stepped directly into and against the pilot of the engine of passenger train No. 79, going south on the southbound main track (R., 36, 30). Plaintiff's witness, the conductor, testified that "As he (intestate) stepped off right at this place he stepped into 79 there" (R., 30). "He swung into it, the pilot sill of the engine," as he stepped off (R., 36). Apparently, the momentum from stepping off his engine carried intestate into and against the pilot of the passing train. "He stepped between the tracks and turned; he had to get his balance" (R., 31, 38). Before stepping off intestate did not look back toward the north and the approaching main line train, but looked

south (R., 38). After he had opened the Etiwan Lead switch and left it open, the conductor walked fifteen or twenty feet to the west of the main line track "to look for a train" (R., 28). He had heard No. 79 blow at the River Side Iron Works, which is somewhat north of the place of the accident, and wanted to be sure intestate saw that train (R., 28). As he approached the main line on the front of the switch engine intestate was looking at the conductor, and the latter tried to call his attention to the approaching train by pointing at it and warning him to stay on the footboard, but intestate may have assumed that the conductor's motions meant that they were going to back up the main track into the Seaboard Air Line track, which was in fact what the crew intended to do (R., 29, 37). At the time he stepped off the front of the switch engine it was not his duty to throw any switches (R., 38, 39), and the conductor had left the switch open for the main line (R., 28); intestate "was supposed to be on the car; it was optional for him to get off and throw the switch" (R., 39). He did not get off to throw any switch on the right side of the track, on which side of the engine he was (R., 39). The switch stand of the Etiwan Lead was *on the left-hand side* of the northbound track (R. plat, page 50), and intestate could have gotten off on the left-hand side of the switch engine by climbing over the drawhead of the engine, as the footboard on which he was standing runs from the right to the left side of the engine; there is a short footboard on each side, with the drawhead in between (R., 39).

The distance from Meeting Street Road to the northbound main track is about six car lengths, or two hun-

dred and forty or two hundred and fifty feet (R., 35). While the view toward the north is obstructed by billboards and shrubbery for about half the distance from Meeting Street Road toward the main line (R., 33-35), when the switch engine had reached a point half way, or *about one hundred and twenty to one hundred and twenty-five feet*, measuring perpendicularly, from the main line tracks, a train coming on the southbound main line could be seen fully *two thousand feet or more* to the north (R., 35, 36, 75, 60, 76). The towerman at Southern Connection Tower, which is about two thousand feet, or one-fourth of a mile, north of Etiwan Lead, the place of the accident, saw the train which struck intestate stop that day (R., 54). The first photograph in the record, just before the plat (R., 50), was taken with a camera about one thousand feet north of the place of the accident and pointed south (the direction No. 79 was running) to the switch, and the "men" indicated in the picture are about two hundred and seventy feet from the switch point, and standing on the curve of the Etiwan Lead, and are plainly in view. The photographer taking this picture testified for plaintiff that these men could see him when he took the picture (R., 16); he could see them (R., 15), and they told him they could see him, which is necessarily true (R., 16), although witness Parnell, one of the men in the picture and brother-in-law to the intestate, testified he could not see the photographer (R., 21, 22, 23), which was obviously untrue, as shown by the second picture, between pages 50 and 51 of the record; also that these men could have been seen at a greater distance than

the 1,000 feet at which he placed his camera (R., 15). These men, who were standing on the Etiwan Lead 270 feet from the switch, are at a point about half way from Meeting Street Road to the northbound main line (R., 30). A man standing on the foot board of the switch engine, where intestate was standing as it came out of Etiwan Lead, could have seen a train coming on the southbound main track from the point where the men are standing on the switch track a considerable distance north of where the camera was placed to take this picture (R., 35), and could have seen such train just as well a little nearer Meeting Street Road (R., 36), that is, a little farther from the point of the accident.

The undisputed evidence shows that a number of signals by bell and whistle were given by No. 79 shortly before intestate was struck. The conductor heard it blow the whistle before it reached the Etiwan Lead, and wanted to be sure that intestate saw the train and tried to give him a hand signal of its approach (R., 28). No. 79 blew four long blows just opposite or after passing Southern Connection Tower (R., 54), which is about 2,000 feet or one-fourth of a mile north of Etiwan Lead (R., 54). The conductor testified for plaintiff (R., 29) that the engine did not blow "right on to him" (meaning intestate), but the undisputed evidence of the fireman of No. 79 is that at the time of the accident "the engineer had just finished blowing the whistle for the block signal for Magnolia Crossing" (R., 77, 63). The automatic bell ringer had been ringing since leaving Ashley Junction (R., 63, 77), and

rang continuously until the accident happened R., 77). The whistle was blown almost continuously along there (R., 77). The engineer put on the emergency brakes as soon as the fireman told him they had hit a man (R., 61, 62). Intestate stepped into the pilot on the fireman's side and, on account of the height of the boiler, the engineer could not see a man stepping in front of his engine on the left side less than fifteen or twenty feet in front of the engine, if the head was out of the window, and could not see a man stepping on the track five feet in front (R., 62). The fireman did not see intestate until he was in the act of stepping off the foot board, when he hallood to the engineer, who applied his brakes immediately (R., 77). Plaintiff's witness testified that train No. 79 should have been able to stop within a train's length and a half (R., 29). The engineer was keeping a proper lookout just before the accident (R., 68).

The conductor testified that the speed of the train was at least fifty miles an hour, but could not tell whether it slackened speed just before the accident (R., 40), as the train was coming directly toward him (R., 40). The conductor's estimate of the speed was the maximum given by any witness, and when he gave that estimate he apparently thought that the speed limit, under the company's rules at that point, was forty miles an hour instead of fifty, as it was (R., 41, 42, 48, 49). Other trainmen and employees, including the engineer, placed the speed at thirty-five or forty miles an hour (R., 61, 54, 72, 73, 76). In fact, the speed limit for train No. 79, a local passenger train, at the point of

the accident was fifty miles an hour (R., 68, 48, 49, 50). "First-class trains," such as this passenger train, had a speed limit of fifty miles an hour, except at certain points where "semaphore interlocking signals are in service," as listed in the rules in evidence (R., 49, 50). The nearest one of these points to the place of the accident is (R., 49) "Southern Connection (Main Line Trains)," where the limit for passenger trains is forty miles an hour, but Etiwan Lead Switch, where the accident occurred, is about 2,000 feet south of Southern Connection, and between that and Magnolia Avenue Crossing Tower (R., 54, 52). The term "Southern Connection," as used in these regulations, means only the signal tower itself (R., 56), which fact is also indicated by the manner in which the semaphore signal points are listed in the speed limitation instructions (R., 48, 49). The undisputed evidence, therefore, is that the speed limit at Etiwan Lead was fifty miles an hour, which was not shown to have been violated. Train No. 79 was runnin[illegible] few minutes late (R., 32, 48).

There is a passover switch a short distance below the place of the accident, on which switch trains crossed over from the northbound main track to the southbound main track (R., 37, 38, and plat 50), and if the switch leading to this and the southbound main track had been thrown, this would have been a signal to traffic on the southbound main track (R., 37, 38), but the crew was doing no work on the southbound main track, but

were going to back up the northbound main track (R., 37), which intestate knew (R., 31).

Intestate had been working for the railroad about five years, and had been working with the yard conductor, with whom he was working when killed, for six or seven months (R., 25). They use the Etiwan Lead switch, where the accident occurred, every day, and sometimes more than once a day (R., 40). Intestate's brother-in-law, who testified for plaintiff, had seen him with the engine, and at that track once or twice (R., 22).

There was verdict and judgment for plaintiff for twenty-five thousand ($25,000) dollars (R., 1, 13, 16), which judgment the State supreme court affirmed on March 28, 1928, as appears from its opinion (R., 113), Cothran, J., dissenting.

II.

Of the specific grounds of negligence alleged in the complaint (R., 3 to 5), the trial judge submitted to the jury the following: (*b*) Negligence in operating the train at a high and dangerous rate of speed and at a speed in excess of that allowed by rules and regulations of defendant; (*c*) In operating the train at such an excessive rate of speed as to prevent intestate from getting out of its way; (*d*) In failing to give timely or sufficient warning or signal; (*e*) In failing to cause the train to slacken speed within yard limits while passing place where employees were accustomed to travel; (*g*) In failing to keep lookout; (*h*) In failing to take precaution for the safety of employees where switching was known to be done all day; (*i*) In failing to furnish a

safe place of work and provide sufficient space between the tracks to enable employees to safely alight from trains; (*m*) In causing and permitting right of way between Etiwan Lead and the main line to be obstructed by bill boards, bushes, etc.; (*n*) In failing to cause the land between the main track and the spur to be kept free from bill boards and shrubbery, to enable employees to see approaching southbound trains on main track. The court charged that plaintiff must recover, if at all, "on *one* or *more* or *all* of these acts of negligence charged" (R., 87).

The trial court gave the following instruction in submitting specification (*b*) of negligence alleged (R., 81 102):

> "The next specification is (*b*):
>
> "In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards."
>
> "Well, it would be a *violation of law* for a railroad company to operate its trains at a high and dangerous rate of speed, and in excess of that *allowed by law*, and it would be *a violation of law to operate in excess of the rate of speed allowed in the yard*. All that may be negligence and carelessness in the defendant, and if that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence." (Italics ours.)

There is no evidence whatever that it was "in violation of law" to operate the train at a high and dangerous rate of speed at the point of the accident, or that there was any legal speed limit there, and no evidence that the train was operated in excess of any safety restriction. This also applies to the instruction next mentioned.

The trial judge gave the following instruction in submitting specification (*c*) of negligence (R., 82, 103):

> "The next specification is subdivision (*c*):
>
> "'In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the said train, and so to avoid being run over by it.'
>
> "Well, if they did that, *that was a violation of law*, but whether or not they did that is a question for you to answer from this evidence. If the defendant did that, and that was negligence and carelessness, and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recover on that act of negligence." Italics ours.)

The trial court also gave the following instruction on assumed risk (R., 90):

> "Now the ninth paragraph sets up assumption of risk, and the law in regard to that is this: whenever a master employs a servant,—and when I say master, I mean the Railroad Company, and when I say servant, I mean the deceased,—whenever a master employs a servant, the servant assumes all the risks ordinarily in-

cident to the work that he is employed to do. That is just as binding on the servant as a written contract. He assumes all ordinary risks. *He does not assume any extraordinary hazards or risks, just those risks connected with his work.* And if the death of the deceased was cause by an ordinary risk, he assumed that. If that was the cause of his death, he assumed that." (Italics ours.)

The trial judge refused to give the following charge requested by petitioner on the same subject (R., 79, 80, 92):

"5. I charge you that an employee may assume the risk of injury from dangers and hazards which are ordinarily incident to his employment, or which arise in the progress of the work. Some employments are necessarily dangerous and fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in the contract of employment. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. Risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, and so forth. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an

> ordinarily prudent person under the circumstances would have observed and appreciated them. If, however, he does actually know and appreciates the danger or risk, or by the exercise of proper care and caution should have known and appreciated the danger or risk, then he is held to have assumed such risk, and cannot recover."

The issue of assumed risk was raised by the pleadings (R., 11) and evidence, and the error in the foregoing charge and refusal to charge was preserved by petitioner's exceptions (R., 107, 108, 101, 102).

III.

Petitioner earnestly contends that the *writ of certiorari* should be granted to review and reverse the judgment of the State supreme court herein, because:

(1) There is no evidence whatever to show negligence proximately causing the injury in obstructing intestate's view of the approaching train, or in failing to give signals, or on any of the other grounds alleged and submitted; the undisputed evidence showing that intestate's death was caused solely by his own act or negligent omission (R., 97, 98).

(2) The undisputed evidence shows that the intestate assumed any risk of injury from stepping between the tracks at the time and place shown, the danger being obvious, and he having knowledge of all relevant circumstances (R., 99).

(3) Because the State court erred in sustaining instructions that it would be a violation of law to operate the train at a high and dangerous rate of speed and in excess of the speed allowed in the yard, there being no evidence whatever that the speed of the train was in violation of law or in excess of that allowed at the place of the accident. The court also charged (R., 87) that plaintiff must recover, if at all, "on *one* or *more* or *all* of these acts of negligence charged."

(4) The State court erred in giving an instruction on assumed risk, to the effect that the employee "does not assume any extraordinary hazards or risks, just those risks connected with his work," and in refusing a correct charge requested by petitioner on this subject (R., 107, 108, 101, 102).

Wherefore, because said decision and judgment of the State supreme court decided the foregoing Federal questions in a way not in accord with the decisions of this Court, your petitioner prays that a *writ of certiorari* be issued to the Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined in this Court, as provided by law, and that upon such review the judgment of the Supreme Court of South Carolina be ordered to be reversed.

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOS. W. DAVIS,

Attorney for Petitioner, Atlantic Coast Line Railroad Company.

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